SUPREME COURT, U. S.

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Supreme Court of The United States

October Term, 1968

NO. 190

UNITED STATES OF AMERICA,

Respondent,

versus

OTHELL CAMPBELL,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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In its brief the Government states that petitioner does not contend that the agents were within the curtilage of petitioner's home. This statement is erroneous.

Before the Fourth Circuit Court of Appeals the petitioner took the position that the activities of the Government agents were in violation of petitioner's Fourth Amendment rights under both the rationale of *Katz v. United States*, 389 U.S. 347 (1967) and under the old theory of curtilage as developed by various federal courts since the decision in *Hester v. United States*, 265 U.S. 57 (1924).

This same position is now taken before this Court. In petitioner's Petition for a writ of certiorari, page 2, Questions Presented No. 4, petitioner states the following question: "Did the appellate court below in its application of the 'open field' doctrine apply an erroneous definition of curtilage to the facts

before it?" At Page 6, Reasons For Granting The Writ, petitioner states that the Court's application of the "curtilage" test to the facts before it was so restricted as to deny an individual in and about his home the protection of the Fourth Amendment.

Questions 1 and 2, on Page 2, of the petition, each raises the issue as to whether the concept of curtilage was properly applied under the facts of this case.

Question 1 included the query of whether the Fourth Amendment protected an individual "from surveillance by agents without an arrest or search warrant when the agents *were hidden on the premises in close proximity to the home.*"

Question 2 included the query of whether one is entitled to the protection of the Fourth Amendment when "observations were made by *trespassing* government agents without a search or arrest warrant who were *hidden on the premises of the accused* in close proximity to his home for the purpose of observing the *accused who was in a position visible only to one so hidden.*"

These two questions clearly raise the issue as to whether the Hester Doctrine was properly applied in the instant case, if the Doctrine is still a valid one.

By the above, petitioner did raise and intends to raise the question of the correctness of the lower Court's holding that the agents were not within the petitioner's curtilage.

The officers observing the petitioner were at the edge of his grassy yard in a cultivated cornpatch, not more than 50 feet away from petitioner's residence. There were no intervening barriers between the agents and petitioner's residence. The portion of the petitioner's residence under observation is not visible from the roadway or from the property of others, and is partially surrounded in a semicircular fashion by a garage, a barn, and a fence which runs through the cornfield. It was this fence the agents crossed in getting to their position of observation. The yard adjacent to petitioner's residence, the garage, the barn and the cultivated cornfield constitute an integral part of the petitioner's "farm economy". The petitioner could not have been observed by the agents from the property

of any other person, and could be observed only from a very limited area in the immediate vicinity of his home.

It is, therefore, submitted that the officers during their surveillance were within the petitioner's curtilage.

If the "curtilage" test is still the proper basis upon which to determine petitioner's Fourth Amendment rights, it is petitioner's position that the lower Court's decision is based upon an incorrect interpretation of *Hester v. United States,* 265 U.S. 57 (1924) in that it grants the protection of the Fourth Amendment only to one in a building. The decision below also fails to consider the substantial difference between the facts in *Hester v. United States* (open unprotected area around a home) and the facts of this case which place petitioner in and about his home in the center of protective surroundings.

For these reasons, and the reasons set forth in petitioner's petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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July 17, 1968.